

# Federal Defenders OF NEW YORK, INC.

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September 16, 2020

**By ECF**

Honorable Paul A. Crotty  
United States District Judge  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: *United States v. Joshua Adam Schulte*, 17 Cr. 548 (PAC)

Dear Judge Crotty:

As ordered by the Court, Mr. Schulte notes below the motions he may need to consider and file prior to trial on the remaining espionage counts.

The motions are as follows:

1. Motion to dismiss the S3 indictment because the jury pool for the grand jury that indicted Mr. Schulte failed to include a fair cross section of grand jurors. Ms. Shroff attended the September 14, 2020 status conference in *United States v. Balde*, 20 Cr. 281, (KPF) which was by telephone due to the ongoing pandemic. Discovery and information is still being provided to the defense by the clerk of the Court. See, Ex. A (transcript of the 9/14 status conference). Mr. Schulte is following the schedule set by Judge Katherine P. Failla. He has preserved his objections by joining in the objections made by the defense in *Balde*.
2. Expert notice and litigation related to possible new defense witnesses including new fact and expert witnesses.
3. Motion for access to the same evidence that the government provided to its forensic expert, Mr. Leedom. If this motion is granted, Mr. Schulte may not have other motions. If the motion is granted in part, denied in part, or fully denied, Mr. Schulte will move to preclude the testimony of Mr. Leedom.
4. Depending on the government's additional motions under CIPA §§ 2 and 10, Mr. Schulte may have a CIPA § 6 motion.
5. Motion for the production of all Stash files released by WikiLeaks.

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6. Motion for the production of information and material that was referenced in the testimony of the government's trial witnesses but that was never given to the defense.
7. Motion in limine to preclude introduction at trial of certain portions of Mr. Schulte's MCC notebooks. See, Govt Ex. (806. 809).
8. Motion in limine to introduce at trial certain portions of Mr. Schulte's MCC notebooks. See, Govt Ex. (806. 809).
9. Motion to preclude evidence of Mr. Schulte's two counts of conviction.
10. The issues and concerns raised at the August 14, 2020 *ex parte* status conference remain unabated, and the limitations on the defense being able to proceed to trial on the timetable proposed by the government remain unchanged. See, Ex. B. Transcript of 8/14 *ex parte* conference. Mr. Schulte reserves his right to file a motion (potentially) challenging the pretrial and trial procedures that may be implemented in light of the COVID-19 pandemic.

Mr. Schulte also reserves his right to file additional motions if circumstances warrant.

Respectfully submitted,

/s/ Edward Zas, Sabrina Shroff & Deborah Colson  
Counsel for Joshua A. Schulte

CC: All Counsel of Record  
(via ECF)

# Exhibit A

K9ELBALC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

20 Cr. 281 (KPF)

6 SOULEYMANE BALDE ,

7 Teleconference

Defendant.

8 -----x

9 New York, N.Y.  
10 September 14, 2020  
11 10:00 a.m.

12 Before:

13 HON. KATHERINE POLK FAILLA,

14 District Judge

15 APPEARANCES

16 AUDREY STRAUSS

17 United States Attorney for the  
18 Southern District of New York

19 MARY CHRISTINE SLAVIK

20 Assistant United States Attorney

21 FEDERAL DEFENDERS OF NEW YORK

22 Attorneys for Defendant

23 JENNIFER ELAINE WILLIS

24 ANNALISA MIRON

25 Also Present:

Robert Rogers, S.D.N.Y. Clerk's Office

Gilbert Cardona, S.D.N.Y. Clerk's Office

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1 DEPUTY CLERK: Counsel, there a couple things to go  
2 over before I bring in the Judge.

3 This is a public courtroom, even if it is remote, and  
4 as such, members of the media and/or public have been known to  
5 dial in to listen to proceedings. And in this case, we do have  
6 media on the line. So we just want you to keep that in mind.

7 Also, I'm going to ask that you each introduce  
8 yourself each time you speak so that way it's clear to the  
9 court reporter on who is speaking, and that way the transcript  
10 will be accurate. I will be recording this conference on our  
11 end as a backup only to the court reporter. The court  
12 reporter's transcript is the official transcript of this  
13 conference. Lastly, I'm going to ask that you keep your phones  
14 on mute if you are not speaking at any given time and remember  
15 to unmute yourself when it is time for you to speak.

16 Does anybody have any questions regarding the  
17 instructions that were just given?

18 MS. SLAVIK: Not from the government. Thanks.

19 MS. WILLIS: Not from the defense. Thank you.

20 DEPUTY CLERK: Thank you.

21 (Case called)

22 MS. SLAVIK: Good morning, your Honor.

23 Christy Slavik, for the United States.

24 THE COURT: Good morning. Thank you, Ms. Slavik.

25 Is anyone else joining you?

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1 MS. SLAVIK: No. Just me this morning, your Honor.

2 THE COURT: That is fine. Thank you.

3 Representing Mr. Balde?

4 MS. WILLIS: Good morning, your Honor.

5 Jennifer Willis and Annalisa Miron, Federal Defenders  
6 of New York, on behalf of Mr. Balde.

7 THE COURT: I thank you very much.

8 I believe, as well, we have members of our court's  
9 clerk's office joining us today.

10 Do I have Mr. Rogers on the line?

11 MR. ROGERS: Yes. Good morning, your Honor.

12 THE COURT: Good morning as well. And thank you, sir.

13 And do I have Mr. Cardona on the line?

14 MR. CARDONA: Yes, I'm on the line, your Honor. Good  
15 morning.

16 THE COURT: Good morning as well.

17 And could you let me know, please, Mr. Cardona, is  
18 there anyone else from the clerk's office on this call?

19 MR. CARDONA: I do not believe so. I believe it was  
20 Mr. Rogers and myself.

21 THE COURT: That is fine. Thank you.

22 All right. Good morning to each of you. And I wish  
23 you well. I wish you continued safety and good health in this  
24 pandemic.

25 And to Ms. Slavik, to Ms. Willis, and to Ms. Miron, I

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1 want to thank you for your patience during this time. We've  
2 been gathering this information for the last couple of days.  
3 But what I noted from our last group telephone conference is  
4 that I didn't have enough information to give you the proper  
5 answers. And that is why Ms. Miron sent us the letter that she  
6 did with additional questions. But as well, I was concerned  
7 about there being something akin to a game of telephone, where  
8 I would be giving information to you thinking that I understood  
9 what was being said but not in fact understanding its import.  
10 And so I wanted to have Mr. Rogers and Mr. Cardona on the line  
11 to help me and to ugh make sure that I wasn't misstating  
12 things.

13 I also want to say that I believe Mr. Rogers, and Mr.  
14 Cardona, and Mr. Burgos as well from the clerk's office, have  
15 done our level best to try and get to the bottom of these  
16 issues. But I will apologize in advance if there's something  
17 else out there about which we are unfamiliar.

18 Ms. Miron, to your question about a discrepancy in the  
19 numbers and how it is that the master wheel and the data that  
20 was produced ended up being not quite correct, I understood  
21 from Mr. Rogers that, in fact, there was incomplete datasets.  
22 And I'm going to ask him please if he could to explain to you  
23 how that came about.

24 Mr. Rogers, if you could please.

25 MR. ROGERS: Thank you, your Honor.

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1                   The jury department turned to the computer systems  
2 folks that support the data for our jury records to gather  
3 those records. The master wheel records for the Manhattan  
4 wheel and the White Plains divisional wheel were combined into  
5 one single Excel spreadsheet. It was not known at the time,  
6 but Excel spreadsheets have a maximum number of rows, just over  
7 one million rows. 1,048,576 rows is the maximum number of rows  
8 can you put in a single Excel spreadsheet report. The combined  
9 data for the Manhattan and White Plains wheels exceeded that  
10 number. This was not noticed at the time. So when the report  
11 was run, it finished, the folks who ran the report thought it  
12 was complete and delivered it, the jury office sent it on  
13 further to the Court and the parties. That problem has now  
14 been recognized as a simple problem to fix. And the wheels  
15 have now been separated into two Excel spreadsheets, each under  
16 that maximum number. So the clerk's office now has in its  
17 possession an Excel spreadsheet reflecting the Manhattan master  
18 wheel and a second Excel spreadsheet reflecting the White  
19 Plains master wheel.

20                   I will note that there is a slight discrepancy in the  
21 numbers, if you wish, we can go into that, your Honor.

22                   THE COURT: I would be happy if you did so. Thank  
23 you. Yes.

24                   MR. ROGERS: Okay. Wasn't sure you were ready for  
25 that.

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1 THE COURT: No. That's fine.

2 MR. ROGERS: When people return a jury qualification  
3 questionnaire, it sometimes becomes evident to the Court that  
4 they have moved from one division to another. Perhaps they  
5 moved from Dutchess County to Manhattan or vice versa. At that  
6 point in time, if they're otherwise qualified, they would be  
7 qualified for future jury service and moved from one wheel to  
8 another. So there are a small number of jurors -- I think it's  
9 in the neighborhood of 16, I believe, plus or minus -- that  
10 were transferred between master wheels.

11 So when comparing the numbers in the cover letter from  
12 Cetera data systems, the contactor that created the original  
13 master wheels and delivered them to the court for our use, a  
14 cover letter was included reflecting totals in the master  
15 wheels from Manhattan and White Plains. Those totals are off,  
16 but if you add them together, they come very close to the grand  
17 total. I am afraid I do have to report though there are four  
18 records that appear in the Sutera Data Systems report that  
19 we've been unable to locate in the court records. I don't have  
20 an explanation for that. We're continuing to look at that.  
21 But over 1 million-some records combined, they do add up to the  
22 grand total in the Sutera Data Systems letter, minus those four  
23 records that we're still continuing to determine where they're  
24 located. And that is my report.

25 THE COURT: Okay. And, Mr. Cardona, do I understand

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1 that you now have in your possession DVDs containing the  
2 revised Excel spreadsheets that have the Manhattan and the  
3 White Plains master jury wheels that were created basically  
4 because we didn't know Excel had a maximum, and you have those  
5 rode to go to the parties, sir?

6 MR. CARDONA: I have sets of those DVDs that were  
7 created. And it was believed that we were going to -- and  
8 again, I would defer, of course, to your Honor as to when we  
9 would provide these, as there are still some questions that  
10 remain. So I didn't know that I can provide these at any time,  
11 but I was still waiting for the green light on mailing them.

12 THE COURT: Absolutely, sir. And I understand that.

13 And in terms of the remaining issue, do you mean the  
14 issue regarding the qualified jury wheels?

15 MR. CARDONA: That is correct.

16 THE COURT: Okay. Thank you.

17 Ms. Slavik, still on the line?

18 MS. SLAVIK: I am, your Honor.

19 THE COURT: Okay. And I hope that what Mr. Rogers  
20 just explained, at least from the government's perspective, the  
21 discrepancy that was identified in Ms. Miron's letter. I going  
22 to ask Ms. Miron in a moment, but I wanted to ask you first.

23 MS. SLAVIK: Yes, your Honor. That appears to make  
24 sense.

25 THE COURT: Okay. And, Ms. Miron, I want to thank

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1 you, and I want to thank your jury consultant, for bringing the  
2 issue to our attention, because in my own mind I didn't realize  
3 there were a maximum number of rows for Excel -- at least the  
4 government's version of it, that's what we have.

5 Does that answer for you, at least temporarily, the  
6 issue of the master jury wheel discrepancy?

7 MS. MIRON: Yes, your Honor. It's a simple  
8 explanation that makes sense. I mean, we'll have to review  
9 just to make sure that the grand jurors are present in the two  
10 datasets. But I think that that will resolve this issue.

11 THE COURT: I was advised by Mr. Cardona and  
12 Mr. Rogers, that in fact the --

13 Is it 22 grand jurors, Ms. Miron?

14 MS. MIRON: No. We think there are 28.

15 THE COURT: I beg your pardon. Thank you. I must  
16 have that confused. I was advised -- and let me please confirm  
17 with Mr. Rogers that they were able to locate all of the grand  
18 jurors in the new set.

19 Is that correct, Mrs. Rogers?

20 MR. CARDONA: Your Honor, if I can answer that.

21 THE COURT: Yes, Mr. Cardona. Thank you very much for  
22 speaking.

23 MR. CARDONA: Yes. I was able to locate all 28 jurors  
24 on the list. And, of course, counsel will, of course, do their  
25 own search and they will be able to locate every single one of

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1 those jurors.

2 THE COURT: Okay. I appreciate that okay. Thank you.

3 So, Ms. Miron, I'm attempted to believe that answers  
4 that issue. And there remains the issue of the qualified jury  
5 wheel. And I think from my own perspective in speaking with  
6 Mr. Cardona and Mr. Rogers, I have a better understanding of  
7 the qualified jury wheel itself.

8 Mr. Rogers, in speaking with me last week, you  
9 mentioned the concept of a bucket, sort of a dynamic qualified  
10 jury wheel. And I'm wondering if you can explain that again to  
11 the folks on this call.

12 MR. ROGERS: Certainly.

13 A brief overview would include the fact that the Court  
14 starts with the voter registration lists, as permitted by the  
15 statute in the jury plan. A contractor creates a master wheel  
16 from those voter registration lists; that's Sutera Data  
17 Systems, the contractor. And that's where we start. Once  
18 every four years we are required to retire our old jury wheel  
19 and create a new one so that we use fresh records and  
20 up-to-date records. When we start we have a master wheel  
21 that's filled and a qualified wheel that's empty. We randomly  
22 select names off the master wheels and mail questionnaires in  
23 large numbers to people, to determine if they're qualified to  
24 serve under the rules of the statute and the Court's jury plan.  
25 Those questionnaires come back -- they're mailed, for example,

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1 for the Manhattan wheel in bulk mailings of around 40,000 at a  
2 time, several times a year. Not everyone gets qualified. Just  
3 because you're on the voter list doesn't mean you're qualified  
4 to serve. You have to meet other criteria. Questionnaires  
5 come back to indicate, for example, that perhaps the person is  
6 not fluent in English or is over the age of 70 and does not  
7 wish to serve. Those sorts of excusals and exemptions are  
8 found in the statute and the jury plan and would cause a person  
9 not to be qualified to serve.

10 So if we mail out 40,000 questionnaires, we don't get  
11 40,000 people filled into the qualified wheel. We fill the  
12 qualified wheel at a fast rate at the beginning of the wheel  
13 because it's empty to start with. We are required by the jury  
14 plan to bring that new list online by September the 1st,  
15 following a presidential election. We gather the voter lists  
16 after the presidential election, and we have ten or eleven  
17 months to get that new wheel up and running.

18 The qualified wheel -- when you referred to buckets,  
19 that's the example I used. The qualified wheel, I look at like  
20 buckets. We have a master wheel bucket and a qualified wheel  
21 bucket. We fill that qualified wheel bucket in the way I just  
22 described. And then we need to summon people to court. So,  
23 again, we randomly select names, this time from the qualified  
24 wheel, to mail a jury summons. When we do that -- I think of  
25 this in my way of logically thinking of it, and it is, in fact,

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1 the way a database works -- the person is tagged. They are, in  
2 effect, moved out of the qualified wheel. They're no longer in  
3 the qualified wheel. They're in a different status. They're  
4 in a summoned status. Still that qualified wheel gets drained  
5 as we mail jury summonses for specific dates for people to  
6 appear for their jury service. So that qualified wheel and  
7 that bucket, as I call it, is dynamic. It gets filled and  
8 emptied, filled and emptied. The jury department mails those  
9 bulk mailings of 40,000 questionnaires several times a year in  
10 order to keep it filled. At any one time if I have 6,000,  
11 8,000, 10,000 names in the qualified wheel, and as a busy  
12 couple of months go by and we summon lots of people to court,  
13 it might drop down to five, four or 3,000, and another mailing  
14 goes out of questionnaires to fill it back up. It's like a gas  
15 tank. We use it up.

16 And so we reported to you that we needed some help in  
17 determining what qualified wheel data to produce for the  
18 parties. Since it's dynamic, it's different. The names in the  
19 wheel today are different than the names in the wheel six  
20 months ago or 12 months ago. And, therefore, we needed some  
21 help -- some guidance from the Court and parties to help narrow  
22 those choices down.

23 THE COURT: All right. Mr. Rogers, as I understand  
24 it, the options include the following: If the defense wanted,  
25 you could give them the qualified wheel information as it

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1 exists right now, today. You could give them the qualified  
2 wheel information for every one who was ever qualified from the  
3 inception of this wheel in 2017 to today. You could also  
4 perhaps gear it towards the qualified wheel as of the date that  
5 the grand jurors were summoned to White Plains for the  
6 particular grand jury that returned the indictment in my case.  
7 I'm not sure if there are other options, but those are the  
8 three that I'm aware of.

9 Is that correct, sir?

10 MR. ROGERS: That is correct. And we are still trying  
11 to determine if option number three is possible.

12 THE COURT: I see. I see.

13 So by that you mean you could give me -- what it is  
14 today, you could give me the entire history of the wheel, but  
15 isolating a particular date it's not clear, sir?

16 MR. ROGERS: Correct. I'm not a computer programmer,  
17 your Honor, and it's not clear to us that we can generate a  
18 report that reflects a date certain of the qualified wheel.

19 THE COURT: I appreciate that.

20 Ms. Miron, turning to you. Again, I'm asking for your  
21 indulgence. If my answers in these prior discussions have  
22 misled you as to what's in the qualified jury wheel, in  
23 speaking with Mr. Rogers, I think I have a better sense of what  
24 it is now.

25 Given that information, is there a particular time

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1 frame at which you and your expert were focused, or do you want  
2 to speak with your expert about that issue?

3 MS. MIRON: I think it makes sense for us to be able  
4 to consult with our expert before reporting on that issue. I  
5 understand it may be impossible to narrow the data to one  
6 certain date. I anticipate that we would want all of the data  
7 from when the qualified wheel began, but I would love the  
8 opportunity to consult first.

9 THE COURT: Okay. Given that -- I don't want to do  
10 too many things by accretion. But would it be your preference,  
11 Ms. Miron that I authorize Mr. Cardona to send to you and to  
12 Ms. Slavik the information regarding the master jury wheel that  
13 has just been identified now that we've figured out the  
14 shortcomings of the Excel spreadsheet?

15 MS. MIRON: Yes, your Honor.

16 THE COURT: Okay. Mr. Cardona, I am authorizing you  
17 to send to Ms. Slavik and to Ms. Miron or Ms. Willis that  
18 information, sir. And I thank you very much for holding it at  
19 my request.

20 Ms. Miron, on that point, how much time -- because I  
21 think we still have a question about whether there's going to  
22 be motion practice in this regard. Tell me please the time  
23 frame that you're looking at.

24 Or do you wish to speak with your expert and propose a  
25 revised schedule for us?

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1 MS. MIRON: Let us consult with him on that point as  
2 well. We could submit a letter addressing both issues by  
3 Wednesday, if that's acceptable.

4 THE COURT: It is acceptable.

5 What I'm hoping to do, for your sake as much as for my  
6 own, is -- again, to be sure that the calls that we do have are  
7 informative, and I think today's was -- as we're speaking now,  
8 are there additional issues that I haven't clarified?

9 MS. MIRON: No. I believe that all of the issues  
10 we've raised have been clarified.

11 THE COURT: Okay. So then I will hear from you by  
12 Wednesday as to what you're looking for and what you're  
13 thinking about in terms of the schedule.

14 And, Ms. Willis, from your specific perspective, is  
15 there anything else we should be addressing in this call?

16 MS. WILLIS: No, your Honor. That's all. Thank you.

17 THE COURT: Okay. Thank you so much.

18 And, Ms. Slavik, from your perspective, is there  
19 anything else we should be addressing in this call?

20 MS. SLAVIK: Not at this moment, your Honor. Thank  
21 you.

22 THE COURT: Okay. To Mr. Rogers and Mr. Cardona, I  
23 thank you, first of all, for accepting this responsibility  
24 after Ms. Thomas retired after many years of service, but also  
25 for being so informative. With that, you are all released. We

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1 are adjourned, and you, in particular, have my thanks.

2 So thank you all very much. And we await word from  
3 the defense. Thank you.

4 MR. ROGERS: Thank you, your Honor.

5 MR. CARDONA: Thank you.

6 MS. MIRON: Thank you, your Honor.

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# Exhibit B – Ex Parte